



**IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN**

Not Reportable

Not of interest to other judges

Case no: D1167/2017

In the matter between:

**JUSTICE QALUKWENZA SINDANE**

**FIRST APPLICANT**

**PHILLANI PAUL MKHULISE**

**SECOND APPLICANT**

and

**ABV BRANDS (PTY) LIMITED**

**RESPONDENT**

**Heard:**

**17,18 and 19 April 2018.**

**Heads filed: 2 May 2018**

**Delivered: 13 July 2018**

**Summary: Dismissal for operational requirements – substantive reason and a fair procedure required- selection criterion is that the incumbent of the position is affected and redundant when the position is declared redundant – no other criteria considered or proposed – the selection criterion is "redundancy" – redundancy not a fair and objective criterion - no alternatives**

**to retrenchment considered except to invite affected employees to apply for vacant positions created in the new organogram – no suitable available positions offered to affected employees – flawed consultation process - retrenchment substantively and procedurally unfair**

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## **JUDGMENT**

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COETZEE. AJ

- [1] The first and second applicants worked for the respondent from 18 April 2016 and 1 April 2016 respectively. The designation of the first applicant was that of Sales Representative – Main Market KZN and that of the second applicant as Sales Manager – Main Market KZN. Both were part of the sales team in KZN.
- [2] The respondent is in the liquor business. It sells, markets, distributes and merchandises liquor products through existing establishments which are its customers.
- [3] The first applicant reported to the second applicant.
- [4] The respondent, according to its statement of defence, during April 2017 resolved to conduct a national restructure ('the restructure') of its commercial sales team and identified five employees whose positions might become redundant. The applicants were two of the five.
- [5] At the time the respondent employed 56 employees of which 25 were in the sales team.
- [6] It is common cause that after the restructure the respondent terminated the services of three of the five affected employees effective 31 May 2017. The applicants are two of those dismissed.

The issues placed in dispute

[7] The applicants placed in dispute the substantive reason for the restructure and the procedural fairness thereof.

#### The substantive fairness

[8] The first applicant in his statement of case disputed the reason for the restructure as follows<sup>1</sup> :

"The Respondent could not provide proof that there existed an optional (sic) requirement to justify retrenchment as a last resort."

[9] The first applicant also pleaded<sup>2</sup> :

"The applicant did not accept that his retrenchment was either procedurally or substantively fair ..."

"The decision to retrench the Applicant was made in advance, was premeditated and the alleged process of retrenchment by the Respondent was merely a smokescreen to disguise its real deficiencies"<sup>3</sup>

[10] The second applicant similarly challenged the substantive reason advanced by the respondent for his dismissal and the fairness of the procedure that the respondent followed.

[11] The second applicant held the view that the respondent restructured its organogram and tailored the new positions to suit certain employees and retrench other employees, one of whom was the second applicant.

#### The procedural fairness

[12] Both applicants specifically challenged the selection criterion adopted by the respondent.

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<sup>1</sup> Statement of Case at para 5.37

<sup>2</sup> Statement of Case at para 5.11

<sup>3</sup> First Applicant's statement of case at para 5.35

[13] The two applicants in their statements of claim challenged the fairness of the consultations and the attempt to reach consensus on the issues specified in section 189 and testified that the notice was defective:

"There was no proper or legally compliant retrenchment notice issued to the Applicant in the circumstances."<sup>4</sup>

[14] Both complained that the respondent did not consider any alternatives to dismissal or alternative employment for them and did not engage in any meaningful consultations to find suitable alternatives to retrenchment.

[15] First applicant for instance pleaded:

"No alternatives to retrenchment were considered or discussed with the Applicant"<sup>5</sup>

[16] The applicants in the trial pursued the challenges on the substantive fairness of their dismissal and the alleged procedural fairness.

#### The respondent's business

[17] The respondent, prior to the restructure, divided its customers into various sectors and groups. What it called its Main Market comprised the customers in the informal sector (shebeens, taverns etc) mostly (in KZN) in the townships but also those who operated in the larger cities.

[18] According to the second applicant Main Market means those customers whose clientele comprised mainly Black clients (the Black market).

[19] The respondent distinguishes from the Main Market customers its Key Account customers. They are mainly in the formal sector and include larger retail customers such as Checkers, Tops, Makro and other larger retail establishments.

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<sup>4</sup> First Applicant's statement of case at para 6.5

<sup>5</sup> First Applicant's Statement of Case at para 5.36

- [20] Because some of the Key Account customers also served predominantly the Black market, those Key Account customers also fell in the category of Main Market customers.
- [21] The respondent distinguishes between to the On-sale and Off-sale customers (both Key account and Main Market) based on whether clients of the customers consumed the liquor at the place of sale, such as at bars and shebeens, or elsewhere such as product purchased from bottle stores to be consumed somewhere else.
- [22] The respondent also served Key Account and Main Market customers in the outlying areas such as Newcastle, Dundee and others. The respondent referred to those areas as the outlying areas or those customers as the inland customers.
- [23] From inception of its business the respondent focused on selling its products to its Key Account and Main Market customers at the various outlets and shops. The managers of those establishments had the authority to procure stock from the respondent. The respondent's appropriate marketing strategy was to influence those managers to procure stock from the respondent.
- [24] The respondent employed salespersons, such as the first and second applicants, and marketing specialists. The salespersons reported to the sales manager in Johannesburg and the marketing specialists, also referred to as trade specialists, reported to their manager in Cape Town.
- [25] The marketing or trade specialists focused on branding the products and producing marketing material for display in the various establishments of its customers.
- [26] The sales team was responsible for selling the respondent's products to the Key Account and Main Market customers and to attend to the merchandising function in the stores. They served on-sale and off-sale customers in the main centres and in the outlying areas.
- [27] Merchandising comprised the correct display of the respondent's products in the stores, ensuring that the products are on the correct shelves and that

promotional material is displayed according to the respondent's requirements. The respondent had a standard template or layout that it applied to each store or customer as to where and how its stock was to be placed on the shelves and the marketing material displayed within each store.

[28] The two applicants performed the function of sales and merchandising in the Main Market while the second applicant in addition was in a supervisory role. The first applicant served the outlying (or inland) customers.

#### The role of Smollan

[29] It is necessary to refer to the role of Smollan.

[30] Smollan is an independent business entity that focusses on merchandising and contact with the decision makers in procurement at the head-office of the larger retailers or Key Account customers. Smollan employs more than 1000 employees.

[31] The respondent entered into a written but unsigned agreement with Smollan effective 1 April 2017. The respondent remunerated Smollan for each case of the respondent's product sold by its customers where Smollan did the merchandising of that product.

[32] Smollan employs merchandisers whose function is to unpack the product at the stores and to ensure that the shelves were full and the stock correctly displayed. Its employees carried out the same merchandising function as that of the respondent's salespersons. Smollan worked for other liquor companies too and thus could have merchandisers in stores where the respondent was unable (for cost considerations) to employ its own merchandisers.

[33] In a communication dated 28 March 2017 the applicant informed all its employees of the presence of Smollan.

[34] The relevant part of the communication to all the employees reads as follows:

"Nothing changes over the next month as there will be a transition period that you will have to manage. At the end of April there will be amendments to your

call cycles and also some restructuring. This new structure will allow the ABV Sales Representatives more capacity to focus on delivering against an ambitious performance agenda that is in line with the business strategy of winning in the Off and On-Trade. These changes and call cycles, customer allocations and teams will be communicated to you by the regional management as soon as there is final clarity as to the lines of responsibilities. Over the next couple of weeks, you will be receiving frequent communication and updates. If you are unsure of what it is and how it affects you, please contact your Line Manager."

- [35] The respondent in this communication did not make any mention of possible redundancies.
- [36] In this communication the respondent explained that during the previous year it became evident to the respondent that its Key Account customers changed their procurement practices by centralising the procurement function at head office. The need to visit local shops of a retailer to influence the manager to procure products from the respondent fell away.
- [37] The respondent advanced the changes to the procurement practices as part of its motivation generally nationwide to restructure.
- [38] The procurement practices remained unchanged with *independent* Key Account customers such as independent liquor shops in the formal sector. The need remained to visit them individually for procurement and merchandising purposes.
- [39] The applicants in their statements of claim alleged that the introduction of Smollan without prior consultation, affected the workload of the sales staff and that the respondent

"... unilaterally decided to adjust and minimise its staff requirements to adjust to the employment of Smollan, who in their own right employ a large number of persons"<sup>6</sup>.

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<sup>6</sup> First Applicant's Statement of Case at para 5.17.

- [40] The introduction of Smollan does not appear in the pre-trial minute as a reason or motivation for the restructuring.
- [41] In the trial the applicants adopted the strategy that the introduction of Smollan had no effect whatsoever on the workload and the positions of the applicants and that the respondent could not rely upon the introduction of Smollan to justify the dismissal of the two applicants.
- [42] The respondent steered clear of the introduction of Smollan as part of the business *rationale* to restructure its business. The association with Smollan nevertheless clearly had an impact on the respondent's business and the workload of the applicants as was foreshadowed in the announcement that accompanied the introduction of Smollan.
- [43] The respondent for instance agreed that the workload of first applicant probably was reduced by 40% because of the introduction of Smollan.

#### The first applicant

- [44] The first applicant joined the respondent from existing employment.
- [45] The first applicant reported to the second applicant who was his manager. The second applicant had a team of two sales representatives reporting to him.
- [46] From the onset there was some disagreement between the first applicant and the respondent about his remuneration. The first applicant contended that this was part of the reason to get rid of him during the restructure.
- [47] The first applicant was stationed in Durban. Prior to 1 April 2017 the functions of the first applicant were to visit the Main Market customers in the outlying areas to influence them to purchase the respondent's products and at the same time to ensure that the shelves are full and the stock and the shops are properly merchandised.
- [48] The first applicant visited customers in amongst others Umlazi, Durban, Vryheid, Dundee, Piet Retief, Underberg, Ladysmith and Paul Pietersburg.

- [49] According to the respondent this necessitated that he had to travel long distances from Durban where he was stationed and because of the distances he quite easily exceeded his monthly allocated fuel allowance of R3000. To render an effective service, he regularly stayed over and the respondent paid for his accommodation.
- [50] According to the first applicant he covered this route once a month. He agreed that he exceeded his travel allowance from time to time.
- [51] The respondent did not dispute the first applicant's evidence that he travelled once a month and that even when the responsible salesperson would be stationed in a place like Dundee or Newcastle that person still had to travel to all the other places to service the customers. Consequently, there would not be much of a reduction in expenses if the salesperson were to be stationed somewhere inland.
- [52] Apart from maintaining that the first applicant exceeded his travel allowance and that the respondent had to cover the accommodation expenses, no figures were put before Court to show the extent of the expenses attaching to the first applicant servicing the Main Market and Key Account customers on his route.
- [53] The respondent conceded that the first applicant grew the inland market. The respondent did not provide actual figures to compare the income and expenses in servicing the Main Market in the outlying areas or to show as to what extent that portion of the market has grown over time since the appointment of first applicant.

#### The second applicant

- [54] The second applicant joined the respondent on 1 April 2016. Daniel Hawkins of the respondent approached the second applicant inviting him to join the respondent.
- [55] The second applicant had prior experience amongst others as a brand builder, trade market specialist and as a trade marketing manager and in sales.

- [56] According to him his functions were to drive sales, introduce new customers, manage the sales representatives reporting to him, follow up on their daily activities and plan promotions with them. He personally also attended to sales.
- [57] According to the second applicant, Daniel Hawkins wanted him to join the respondent to assist with a specified number of brands and to "Come and fix the trade in the Main Market in KZN". The respondent did not set any targets for him when he was appointed.
- [58] He met with Daniel Hawkins and agreed his remuneration subject to confirmation thereof by the managing director. Daniel Hawkins sent the second applicant an email confirming the arrangement and that the managing director had to approve the deal.
- [59] The initial appointment was for six months until September 2016.
- [60] From the onset there was disagreement between the second applicant and the respondent about his contract and his remuneration. At the time of the restructure the disagreement had not been resolved. The second applicant maintained that the respondent wanted to get rid of him because of the disagreement in respect of his contract and his remuneration.
- [61] As agreed with Daniel Hawkins the second applicant appointed three sales representatives reporting to him. One of them subsequently resigned. The remaining two were the first applicant and one Lethu.
- [62] The respondent refers to the second applicant's managerial role as his "Span of control".
- [63] The second applicant initially reported to Daniel Hawkins and Ross until Brandon Ansley became the national sales manager in October 2016. The second applicant only became aware of the need to achieve specified volumes and sales targets in a discussion with Brandon Ansley during September 2016 when the first six month's contract expired.

[64] As a result of the restructure Lethu successfully applied for a new position and instead of reporting to the second applicant, reported to the regional manager.

[65] The second applicant retained his sales function but because of the retrenchment of the first applicant and Lethu reporting to the regional manager he, according to the respondent lost his "span of control".

#### The consultations

[66] Notwithstanding the promise in the communication of 28 March 2017 of frequent communication and updates over the "next couple of weeks" and possible changes towards the end of April 2017, the next communication came in the form of a presentation of a national restructure.

[67] The organisational redesign proposed by respondent commenced with this presentation on 11 April 2017.

[68] Angelo Hendriks is the human resources director of the respondent. He arranged a meeting with the managers in KwaZulu-Natal to inform them of the proposed restructure.

[69] He first made the presentation to the KZN managers for them not to be surprised when the intention to restructure was communicated to the rest of the employees in their presence.

[70] It is in dispute whether Angelo Hendriks used a projector for his presentation to the managers or whether he merely called the presentation up on his laptop and went through the presentation with the managers from his laptop.

[71] This meeting of managers was attended *inter alia*, by the second applicant. The second applicant denied that Angelo Hendriks did his presentation with a projector. According to him Angelo Hendriks called the presentation up on his laptop and went through the presentation. According to him Angelo Hendriks said that questions could be asked during the one-on-one meetings that would follow after the presentation to the managers. Angelo Hendriks testified that in this meeting he provided time for questions.

[72] The presentation contains the following relevant slides:

**"Business Rationale**

Smollan's coalition would allow us to secure a wider coverage of Key Account customers and allow for greater market penetration, opportunity to assess the efficacy of the current field sales commercial department against the business' strategic performance objectives of Cost containment, Spans of control versus impact and channel/location penetration versus business objective.

Structural changes were needed where certain roles were not addressing the business objective.

The Organisational Redesign allows for the opportunity to review cost containment initiatives such as redesigning locations of roles, role requirements and productivity of new roles within the business.

With this review, there is the possibility of dismissals due to Operational Reasons."

[73] The applicants testified that the business rationale was not understood by them and was formulated in a difficult way.

[74] A further slide deals with the legal obligations of the respondent:

**"Legal Obligations**

Considered as a No Fault (sic) dismissal for operational reasons.

There is an opportunity to consult and partake in a Joint Consensus seeking process.

Opportunity for employees to make submissions for consideration on:

Timing of the Dismissals

Number of people that will be possibly affected

Severance to be paid

Assistance to employees and the possibility of future employment"

[75] The applicants submitted that as is apparent from this slide there was no invitation to consult on the business rationale

[76] The presentation also deals with the restructuring process itself:

**"The Steps**

One on one consultations with affected employees will take place after this meeting.

Notification of the start of the Section 189 Consultation Letters will be issued to affected staff.

Conversations and consultations with affected employees will be held regularly on a one – one basis.

Once all processes are completed, we will then issue affected staff with letters confirming the retrenchment."

[77] The applicants submitted that there was no regular conversations or consultations as envisaged.

[78] Immediately after the meeting with the managers a further meeting was held with the affected employees attended by both applicants. The two applicants testified that during this meeting with the affected employees as selected by the respondent they could not see the slides as Angelo Hendriks talked to them from the slides on his laptop. Angelo Hendriks testified that he used the projector.

[79] Both applicants testified that they were not given an opportunity to ask questions during this meeting.

[80] Angelo Hendriks then had a one-on-one meeting with the first applicant and a separate one-on-one meeting with the second applicant.

[81] The first applicant denied that he had the opportunity to put any questions to Angelo Hendriks during the one-on-one meeting. He was told that his position was redundant but that a similar position was proposed for the inland customers

based closer to the customers at Dundee or New Castle. He was told to apply for any suitable position. The fact that a similar position would exist but that it was not offered to him created the impression with him that the company did not want him as his position in his view remained the same.

[82] The second applicant testified that during the one-on-one meeting he was told by Angelo Hendriks not to apply for any position as there was no position available to him. He ascribed this to the exchange that he had in respect of his remuneration and contract.

[83] Angelo Hendriks testified that both applicants had an opportunity to ask questions and get clarification. He denied informing the second applicant not to apply for any position as there would not be a position for him.

[84] Angelo Hendriks prepared a script to assist the persons handing over the section 189 notice to the affected persons. The relevant portion reads as follows:

"In order to align to the legal precedent, we will follow a consultative process in order to give you an opportunity to engage with the business on the proposed changes. The consultation will commence as from now and will come to an end on Monday, 21 April 2017, 12 noon. I encourage you to use this time to gain as much clarity on the proposals presented and discussed and how they will impact you. We will be communicating with you on an ongoing basis via emails, teleconferences as well as using existing communication channels.

Our aim is to as far as possible, minimise the impact and risks of job losses. As part of making this process as efficient as possible so to mitigate the impact and stress on you, you will be permitted to apply for roles that are vacant in the organisation and this will be made available to you via email by close of business and will also be available from your line manager as well. In making a final decision based on the interview, our proposed selection criteria for the interview panel will be:

- Functional and leadership capabilities to that of the role that is required.

- Mobility & flexibility to move to where the role is based. Any cost incurred relating to relocation to the new location would be for your own account."

[85] Angelo Hendriks issued each of the applicants with a section 189 notice during the one-on-one meetings. Both applicants testified that the contents of the notice were not explained in detail during the one-on-one meetings. Angelo Hendriks disputed this.

[86] The notice in terms of section 189 reads as follows:

"1. As you were made aware through the announcement that there has been a fundamental shift in the operations of the company with the introduction of Smollan as the Sales – Merchandising company of the Grocer's Channel.

2. With the introduction of Smollan, ABV has assessed the company's operations and future requirements and has formulated a strategy aimed to deliver a sustainable long-term business model in the South African market that is focused on growth of the on-trade spirits portfolio.

3. Subsequent to the assessment, the company has formulated an approach that will create a sustainable and competitive business strategy in order to achieve its performance agenda. In order to obtain this competitive advantage, ABV Brands envisages a structure that is agile, effective and efficient and focused on achieving the performance ambition as set by the shareholders.

4. ABV Brands has taken a principled decision to restructure the commercial field sales workforce, in order to maximise the capacity and productivity of the sales staff and to emulate the regional net sales volume, along with the adjustment of the spans of control within the organisation.

5. Based on the above mentioned structural changes, may result in possible retrenchments within the Regional commercial field sales teams.

6. This letter serves as notice that your role is potentially impacted as a result of this structural change.

7. We wish to assure you that the company is committed to consulting (sic) with you in good faith and on a meaningful basis and will attempt to reach consensus with you on:

7.1 Appropriate measures:

7.1.1 to avoid the dismissal

7.1.2 minimise the number of dismissals

7.1.3 to change the timing of the dismissal

7.1.4 to mitigate the adverse effects of the dismissal

7.1.5 the method of selecting employees who face potential dismissal; and

7.1.6 severance pay for the dismissed employees.

8. During the consultation process ABV Brands intends to engage with you on the following points:

**The reason for possible retrenchment**

The position was identified as a position which could be made redundant for the reasons set out in business rationale above. As your position will possibly become redundant and will no longer be required, you were selected as an employee who could be retrenched. During the consultation process you are at liberty to discuss other selection criteria which you may believe to be appropriate.

**Alternatives considered by the Company**

As the company has to change the structure as well as reduce costs, these changes may potentially make your role redundant. We have given immense consideration to alternatives to the retrenchment and redundancy but none was found that could avoid this potential course of action. You are invited to make representations in respect of any proposals, which you feel are feasible and ABV Brands will consider all proposals made and submitted by you. Such representations are to be made in writing and submitted to the HR Director by no later than 16H 30 on 21 April 2017.

In order to mitigate the impact of the retrenchment, you are able to apply to a vacant for a role (sic) within the business that matches your skill set. Should you be successful in your application, you would adopt the new role's terms and conditions and any cost of relocation, where applicable, would be for your cost, unless otherwise agreed in writing by the employer and yourself.

### **Selection Criteria**

The proposed selection criteria for the respective impacted employees will be as follows:

Main Market Sales Managers: The Western Cape Main Market Sales Manager and KwaZulu Natal Main Market Sales Manager roles will become redundant. The individuals occupying those roles have therefore been selected.

Sales Representatives: The affected Sales Representatives will need to apply for the vacant positions that exists within the region. Individuals will be selected based on the subsequent interviews and those individuals that were not successful will be retrenched.

...

### Number of people

the company envisages that only five employees could be affected by the structural changes.

...

### Consultation

We look forward to meaningful consultations with yourself over the next few weeks."

[87] It was put to the respondent's two witnesses that the language in the presentation and the section 189 notices was not such that the applicants could understand what the respondent tried to convey to them. They were of the opinion that the contents were adequately explained to the applicants.

- [88] The respondent the next day provided the applicants with a list of the newly created positions in the new organogram. According to the respondent they could apply for any of those positions that they felt to be suitable. The list of positions included salespersons and marketing specialists.
- [89] After the presentation and the other meetings on 11 April 2016 Angelo Hendriks telephoned the first applicant as promised. According to Angelo Hendriks the first applicant refused to talk to him and the first applicant put the phone down. This, according to him, happened twice. Eventually the first applicant made a proposal about severance pay which proposal the respondent quickly rejected.
- [90] The first applicant testified that being inland he did not put the phone down but that he was in an area where the reception was poor and the calls interrupted.
- [91] In addition, on his version he was told that he needed not apply for any vacancy and therefore, apart from severance pay, there was nothing to consult on.
- [92] The first applicant testified that at the outset he formed the impression that the respondent did not want him or his services any more as they required him to apply for what he regarded as his position. For that reason, he did not apply for any other position and did not make any other proposals.
- [93] The respondent did not make any further attempts to consult with the first applicant as it adopted the stance that it was up to the affected employees to ask if they did not understand the notice, make proposals on the selection criterion, alternatives to dismissal and severance pay.
- [94] Angelo Hendriks also found the second applicant unwilling to discuss any aspect. The second applicant eventually promised to make a proposal but only about severance pay. On a later occasion the second applicant indicated to Angelo Hendriks that his attorney would contact him. The second applicant's attorney in fact communicated with Angelo Hendriks informing him that his client had not been properly informed about the restructure, that no proper consultation followed and that he required a copy of the agreement between the respondent and Smollan. He also made proposals about a package.

- [95] Angelo Hendriks replied dismissing the proposal in respect of a severance package and asking the second applicant to identify that part of the agreement between Smollan and the respondent he would want to see as that contract was confidential and could not be provided in full.
- [96] It later surfaced that there was no agreement in writing between the respondent and Smollan.
- [97] The second applicant testified that he was told not to apply for any other position. That motivated him not to try and make any proposals or submit any alternatives expect about a severance package. His proposal was rejected without the respondent making an attempt to understand the basis for his proposal.
- [98] He testified that during the last two weeks prior to the presentation his communications were cut off and he did not receive any response from management with regard to his queries relating to his remuneration and contract. This strengthened his understanding that the respondent used the restructure to get rid of him.

#### The redundancy of the first applicant

- [99] The respondent applied its selection criterion and declared the first applicant's position redundant. In terms of the proposed new organogram the respondent created a similar position located inland at Newcastle or Dundee. The purpose of this exercise was to reduce the travelling and accommodation expenses.
- [100] The respondent conceded that effectively the first applicant's position moved geographically from Durban to Newcastle or Dundee. Otherwise everything, except the expenses, remained the same.
- [101] The result of the agreement with Smollan was that approximately 40% of the functions of the first applicant transferred to Smollan employees. The respondent's case however was that the introduction of Smollan was not the reason why the position of the first applicant became redundant.

[102] The first applicant contends that his position never became redundant. The only change was that the person filling the position had to move to a location inland. The position should not have been declared redundant in the first place.

[103] In addition, the first applicant contends that there would not be a substantial cost saving if the position is created at Newcastle or Dundee as the travelling would remain basically the same to visit the various towns from where the person would then be stationed.

[104] The respondent advertised the position in Newcastle or Dundee and failed to find a suitable candidate. The respondent now serves its customers in those areas from the call centre in Cape Town. The respondent did not provide hard figures on whether it lost customers because of the retrenchment of the first applicant and its failure to appoint somebody to what it regarded as the newly created position but in fact was the same position that moved geographically. The respondent conceded that as from the date of the retrenchment of the first applicant it could not service those customers as effectively as the first applicant did.

The respondent did not think it prudent to offer the inland position to the first applicant. The respondent proffered an explanation for not offering the position to the first applicant, or at least to sit down and discuss the position with the first applicant. The explanation was that it did not want to prescribe to the first applicant what he should do. By offering the position to him it would also, so it reasoned, prejudice other affected employees who might wish to apply for the position and thirdly it invited the first applicant to apply for any vacant position which he failed to do.

#### The redundancy of the second applicant

[105] The respondent declared the position of the second applicant redundant by applying its selection criterion.

[106] The respondent reasoned that the second applicant lost his "Span of control" when the first applicant became redundant and the second employee reporting

to him, Lethu, initially became redundant but was then appointed to a newly created position in KwaZulu-Natal. When he was appointed to the newly created position he reported to the regional manager.

[107] That left the second applicant with only his marketing function and a very limited merchandising function.

[108] The second applicant had experience as a trade specialist. Because he was told not to apply for any position he did not apply for any of the positions in the new organogram. The respondent never enquired from him why he did not apply for any position. The respondent was content with the position that the second applicant had not applied for a vacancy.

[109] The second applicant testified that he could also do the marketing function. The respondent did not consider him for any marketing position in KwaZulu-Natal and did not offer him any position. Neither did the respondent encourage him to apply for any position.

#### Analysis:

##### The selection criterion

[110] The respondent in the presentation and the section 189 notice relied upon redundancy as the selection criterion. The respondent in oral evidence again emphasised that it adopted "redundancy" as the only selection criterion.

[111] It is common cause that the respondent resolved that five positions would be affected by its restructuring. Those were all sales (and merchandising) positions.

[112] The respondent selected only the incumbents of those five positions based on the redundancy of those positions as affected employees. The respondent issued the section 189 notices to only those five employees.

[113] The applicants challenged the selection criterion as unfair and not objective. There was no agreement between the parties as to what selection criterion should be applied. The respondent as the employer under those circumstances

was under a duty to apply fair and objective criteria and in this trial had to justify the criteria as fair and objective.

[114] The respondent's argument that the affected employees could propose other selection criteria is not a defence to its own failure to, in the absence of agreement or consensus, adopt a criterion that is fair and objective.

[115] The fact that the applicants did not propose alternative criteria at the time does not make the criterion proposed by the respondent fair if otherwise it would not have been fair.

[116] The Labour Court in *BEMAWU obo Mohapi v Clear Channel Independent (Pty) Ltd*<sup>7</sup> dismissed "redundancy" as a fair and objective selection criterion:

"As indicated earlier, the criterion used in selecting the applicants for retrenchment amongst the sales employees of the respondent was "redundancy". In my view, this is clearly an unfair criterion. In this respect I agree with the legal representative of the applicants that "redundancy" can never be a fair and objective selection criterion, as it is the cause of the retrenchment".

[117] The applicants in the trial contended that the respondent should also have considered LIFO as an appropriate criterion.

[118] Respondent conceded that had it applied LIFO Kirthi Maharaj, also a sales representative such as the first applicant, had shorter service with the respondent than the first applicant. The respondent, however, did not include Kirthi Maharaj as an affected sales representative because, in its view, her position was not affected by the single selection criterion that the respondent adopted and in addition making her redundant would have disrupted the operations in the area that she served.

[119] The unchallenged evidence of the first applicant was that he previously served the same area and same customers as Kirthi Maharaj. Selecting Kirthi Maharaj

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<sup>7</sup> [2010] JOL 25848 (LC) [43].

for retrenchment would not have disrupted the respondent's operations in that area.

[120] The respondent adopted the selection criterion of redundancy and that led to the respondent's failure to include all the sales representatives in the area as affected employees. This was prejudicial to the first applicant.

[121] According to first applicant the respondent erroneously regarded his position as redundant. All that happened was that the position with all its functions was relocated inland. That does not mean that the position became redundant. All that the respondent wished to achieve was to reduce the costs of servicing the inland customers and that was the reason to declare his position redundant.

[122] The facts are not that dissimilar from the facts in the CCMA arbitration in the matter of *Moyana and Port Wild Props 23 CC t/a Bickley Terraces*.<sup>8</sup> The employer employed the applicant as a chef. When business declined the employer unsuccessfully tried to come to alternative arrangements with the applicant. The employer then declared the position redundant and dismissed the applicant for operational reasons. The only purpose of the dismissal was to reduce costs. Someone else took over the functions of the chef. The Commissioner held the dismissal to be substantively unfair as the position had not become redundant.

[123] The respondent wrongly decided that the first applicant's position became redundant. The *position* never was redundant. It moved geographically. The respondent conceded that but for the location of the position nothing changed.

[124] The respondent failed to engage the first applicant on whether a relocation would be feasible. The respondent acted procedurally unfair in failing to engage the first applicant on this aspect. It was, on the facts of this matter, the duty of the respondent to engage first applicant on a possible relocation and respondent acted unfairly in shifting the obligation to first applicant to have raised this as an alternative to retrenchment.

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<sup>8</sup> (2009) 30 ILJ 707 (CCMA).

[125] The respondent therefore had no substantive reason to dismiss first applicant.

The respondent incorrectly identified his position as redundant while conceding that the position moved inland. Respondent conceded that but for the geographical change everything remained the same and the position was advertised as such.

[126] The respondent advertised the position but has not found anybody to appoint to the position to serve the inland customers. According to the respondent it eventually removed the position from its organogram and now serves those customers through a call centre.

[127] The first applicant justifiably formed the impression that the respondent wanted him out of the company by declaring his position redundant and by requiring of him to apply for the position that he regarded as his own position.

[128] The dismissal of the first applicant was substantively unfair because of the wrong view of the respondent that the position became redundant.

[129] The dismissal of the first applicant was also procedurally unfair in that the respondent failed to consult the first applicant on whether the first applicant would be willing to relocate inland.

#### The second applicant

[130] The second applicant was selected for redundancy because of the loss of his span of control when both the first applicant and Lethu were selected for redundancy.

[131] The respondent did not consider the second applicant for an alternative position in KwaZulu-Natal as a sales representative. He testified that he would have considered such a position if it was discussed with him.

[132] It is common cause that other sales representatives in KwaZulu-Natal joined the respondent after the second applicant.

[133] Both witnesses for the respondent were unaware of the second applicant's experience and expertise as a trade specialist.

[134] The respondent failed to justify the selection criterion as fair and objective and this affected the substantive reason for the dismissal of the first applicant. This is a basis upon which the first applicant's dismissal is substantively unfair.

[135] The first applicant is entitled to reinstatement and there is no reason why the first applicant cannot be reinstated into his position.

[136] The respondent selected the second applicant on the same basis as it selected the first applicant. It applied "redundancy" as the selection criterion. The respondent has failed to justify the selection criterion as fair and objective. It used the cause of the retrenchment as the selection criterion. The respondent thereby excluded employees that should have been affected in order to follow a fair procedure.

[137] The dismissal of the second applicant was substantively unfair as the respondent applied a selection criterion that was not fair and objective.

[138] The second applicant wants to be reinstated. The respondent has not discharged the onus to show that reinstatement is not appropriate.

#### More about the procedure

[139] The procedure that the respondent adopted to require the affected employees to apply for vacancies is not in itself unfair. What makes this procedure unfair in this matter is the fact that only some of the employees doing the same work were regarded as affected and had to apply for vacancies. The procedure was unfair because of a limitation of the vacancies by limiting the number of affected employees in adopting an unfair criterion.

[140] Some employees doing the same work as the first applicant were protected from the restructuring exercise and from having to apply for a position. That is unfair to the applicants.

[141] The overall impression is that the respondent after having decided to embark upon the restructuring process failed to meaningfully engage the two applicants in giving effect to the decision to restructure. The formulation of the business

rationale is not clear and concise. The language used by the respondent in the section 189 notice and in the presentation describing the rationale is difficult to follow.

[142] The second applicant referred the section 189 notice to his attorney. His attorney then addressed correspondence to the respondent to which it received no meaningful response.

[143] The applicants also challenged the procedure on the basis that the respondent did not consider alternatives to dismissal.

[144] In this regard the respondent makes mention of the fact that it has "... given immense consideration to alternatives to the retrenchment and redundancy ..." only to concede in evidence that the only alternative that it considered was to make available the vacancies in the new organogram for the affected employees to apply for. The respondent used words on paper that did not mean anything in practice.

[145] The respondent never considered as an alternative to retrenchment whether first applicant would be prepared to move inland to be stationed at Newcastle or Dundee. The respondent also never considered whether it should encourage the second applicant to apply for a position as a trade specialist or for any other marketing position in KwaZulu-Natal.

[146] Applying the dictum of the Labour Appeal Court in *Johnson & Johnson (Pty) LTD v Chemical Workers Industrial Union*<sup>9</sup> the conduct of the respondent falls short of what is required:

"The important implication of this is that a mechanical, 'checklist' kind of approach to determine whether s189 has been complied with is inappropriate. The proper approach is to ascertain whether the purpose of the section (the occurrence of a joint consensus seeking process) has been achieved."

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<sup>9</sup> (1999) 20 ILJ 89 (LAC).

[147] The respondent was satisfied that once it made its proposal, everything else could be left in the hands of the few employees that the respondent selected for retrenchment.

[148] The respondent also did not abide by what it told its employees when announcing the venture with Smollan during March 2016.

[149] The respondent announced to its workforce that respondent would keep them informed through emails and other ways of communication and that by the end of April they could expect further developments.

[150] Within two weeks the respondent had selected for retrenchment those employees whose positions in its view became redundant.

[151] Ordinarily adopting a process whereby, the affected employees are invited to apply for vacancies, either existing or newly created, in itself is not unfair. Where a limited number of employees are affected, such as in this case, the employer has to go one step further and see whether there are suitable positions and encourage the affected employees to apply for specific positions.

[152] If any of them do not apply for eminently suitable positions, then it is incumbent upon the respondent to enquire into the reasons to attempt to avoid dismissals.

[153] During the trial the respondent persisted with the view that once it had made its proposals such as of a selection criterion, it was up to the affected employees to make counterproposals if they were not happy with the proposals. Because the applicants did not make other proposals, such as LIFO, the respondent took it for instance that the selection criterion was fair and objective.

[154] The prevailing impression during the trial was that the respondent was satisfied that it discharged its duty to consult after having met with the applicants on the day of the presentation and following up with one or two telephone calls to find out if they had any counterproposals.

[155] The respondent omitted in the presentation to invite the employees to consult on the substantive reason (the business rationale) for the exercise. This again

is indicative of the attitude of the respondent. It made its proposal and then left it to the affected employees to deal with.

[156] The respondent complains that the two applicants were obstructive and that they did not wish to participate in any meaningful consensus seeking consultation.

[157] Nothing however prevented the respondent from making a meaningful attempt to understand their position and to find common ground. They explained the telephone calls and the circumstances surrounding the calls. They were not obstructive and did not refuse to communicate with the respondent. The respondent failed to understand what their position was and never made any attempt at finding out.

[158] The applicants are justified in complaining that there was no fair process and that they were selected for retrenchment simply on the basis that the respondent decided that their positions were redundant and that they have therefore been selected for retrenchment.

[159] In conclusion the respondent failed to justify its selection criterion as fair and objective. The respondent failed to meaningfully consult with the two applicants. The respondent failed to justify the dismissal of the two applicants as substantively and procedurally fair. Both want to be reinstated. There is no reason why they cannot be reinstated.

#### Costs

[160] I have considered the factors that determine a cost order. The applicants have been successful. The applicants and the respondent will be in an employment relationship because of this order. For that reason, a cost order is not appropriate. Each party is to pay their own costs.

[161] I make the following order:

#### Order:

1. The dismissal of the first and second applicants was substantively and procedurally unfair.
2. The first and second applicants are reinstated on terms and conditions not less favourable than those that applied to them on the date of their dismissal on 31 May 2017.
3. Their reinstatement is retrospective with full pay and benefits to 31 May 2017.
4. The applicants must report for duty within 14 days of the date of this order.
5. There is no order as to costs.

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F Coetzee

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicants: Advocate N Govender

Instructed by: Mdu Nkomo & Company

For the Respondent: Felicia van Rooi of Felicia van Rooi Attorneys

LABOUR COURT